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IN THE SUPREME COURT OF THE STATE OF FLORIDA

DENO GREEN,

Petitioner,

v. Case No. 90,696

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

The decision in this case does not expressly or directly conflict with any other decision and so this Court should not exercise jurisdiction in this case.

ARGUMENT

THERE IS NO EXPRESS OR DIRECT CONFLICT BETWEEN THE DECISION IN THIS CASE AND ANY OTHER DECISION SUCH THAT THIS COURT SHOULD EXERCISE JURISDICTION

Petitioner Green scored 93.8 points on the guidelines scoresheet which corresponded to the recommended prison term of 65.8 months. He was sentenced to 72 months' incarceration, which was within 25% of the recommended sentence. On appeal he argued that where the recommended range encompassed the statutory maximum, the sentencing court was limited to imposing the statutory maximum. The decision below interpreted a sentence from section 921.001(5), Florida Statutes, (1995) : 'If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by §775.082, the sentence under the guidelines must be imposed, absent a departure." The court found that there was no departure sentence in this case, and hence no conflict. The last paragraph of the decision made the following observation:

> The emphasized line from section 921.001(5) quoted above should read, for purposes of clarity, as follows: "If *the* recommended sentence under the guidelines exceeds the maximum sentence other authorized by §775.082, a sentence under the

> guidelines must be imposed, absent a departure." It would appear, from a grammatical standpoint, that the articles in the foregoing sentence are misplaced in the printed statute.

Green v. State, 22 Fla. L. Weekly D614 (Fla. 5th DCA Mar. 7, 1997) It is this suggested correction made in parting that Petitioner relies upon for conflict jurisdiction.

Under Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court held that the only facts relevant to the decision to accept or reject petitions for review are those facts contained within the four corners of the majority decision; neither the dissenting opinion nor the record may be used to establish jurisdiction. Moreover, jurisdiction depends upon whether the conflict between decisions is express and direct and not whether the conflict is inherent or implied. Dept. Of HRS v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986). The district courts are ordinarily the court of final appellate jurisdiction, and this Court's review on

the basis of conflict of decisions is limited.

Viewed in this light, there is no basis to exercise jurisdiction in this case. Petitioner requests this Court to exercise its discretionary jurisdiction on the ground that the decision below 'rewrites" the statute at issue, and that this method of deciding the case conflicts with other decisions. This argument is not well founded for several reasons.

First, Petitioner's argument is not based upon conflict of decisions, but rather, the manner in which that decision was reached. The holding of the case is the decision, not grammatical improvements to the statute suggested in parting. As Justice Adkins explained in Gibson v. Maloney, 231 So. 2d 823, 824 (Fla. 1970), "... (I)t is conflict of *decisions,* not conflict of opinions *or reasons* that supplies jurisdiction for review by certiorari." (emphasis in original)

second, it has long been established that Courts may transpose words or phrases in accord with legislative intent. State ex rel Givens v. Holland, 147 Fla. 396, 2 So. 2d 725 (1941). Where the text of a statute is clear, a Court may properly effectuate that intent by supplying words or correcting clerical errors. City of Opa Locka v. Trustees of Plumbing Industry Promotion Fund, 193 So. 2d 29 (Fla. 1st DCA 1966 (Substituting "on" for "or" and inserting

the word "of".) The cases relied upon by Petitioner did not merely move around words which were already in the statute, the grammatical suggestion made below, but instead, added entirely new requirements by inserting additional language in the statute. Sarasota Herald-Tribune v. Sarasota County, 632 So. 2d 606, 607 (Fla. 2d DCA 1993)("If additional requirements are to be imposed, they should be inserted by the legislature.")

Finally, the holding of the case below is not in conflict with other district court decisions on the same question of law. Every appellate court to consider this provision of the statute to date has ruled the same way. Delancev v. State, 673 So. 2d 541 (Fla. 3d DCA 1996); Nantz v. State, 687 So. 2d 845 (Fla. 2d DCA 1996); see also, Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995). Since there is no conflict between decisions, this Court should not accept jurisdiction in this case.

CONCLUSION

Based upon the foregoing argument and authority, the State respectfully requests this Honorable Court to decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing motion has been furnished by delivery to Assistant Public Defender Dee R. Ball, counsel for Petitioner, at 112A Orange Avenue, Daytona Beach, FL 32114, this 16th day of June, 1997.

Belle B. Turner
Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DENO GREEN,

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v. Case No. 90,696

STATE OF FLORIDA,

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ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT AND THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

Green v. State,
22 Fla. L. Weekly D614(Fla. 5th DCA Mar. 7,1997)........A

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Attorney General, Tallahassee. and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellant. No Appearance for Appellee.

(ANTOON, J.) The state appeals the trial court's order granting defendant's motion to suppress evidence. The defendant was charged with battery on a law enforcement officer,[1] resisting an officer with violence,[2] and possession of cannabis.[3] Following an evidentiary hearing, the trial court entered its oral ruling, suppressing "everything that occurred at and after [the] pretextual stop . . ."

The instant record contains no written motion to suppress and no written suppression order. The trial court orally announced its ruling at the conclusion of the hearing and then signed the court minutes which noted "defense motion granted" with no further explanation. Thus, the trial court's oral ruling is unclear with respect to what evidence the court intended to suppress. Therefore, we vacate the order and remand this matter to the trial court for a period of fifteen (15) days from the date of this opinion to enter a written order disposing of the motion. We also direct the state to supplement the record with the written suppression motion, if one exists.

We take this opportunity to remind the trial court and trial counsel of the importance of clearly stated motions and rulings. In this regard, counsel has an interest in ensuring that the record supports the argument raised on appeal. While not always required, written motions are preferable. This court has recognized that the signing of court minutes indicating that a motion to suppress is granted is sufficient to constitute "rendering" for jurisdictional purposes. *State v. Brown*. 629 So. 2d 980 (Fla. 5th DCA 1993). Nonetheless. trial courts have an obligation to clearly and fully set forth their rulings.

VACATED and REMANDED. (PETERSON, C.J., and THOMPSON, J., concur.)

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[1]§ 784.03, 784.045, 784.07, Fla. Stat. (1993).

[2]§ 843.01, Fla. Stat. (1993).

[3]§ 893.131 Fla. Stat. (1993).

* * *

Criminal law-Sentencing-Guidelines-Seventy-two months' incarceration for attempted voluntary manslaughter with a firearm, a third degree felony, was permissible even though it exceeded the five-year statutory maximum for a third degree felony-Sentence imposed did not exceed by 25% the recommended guideline prison sentence of 65.8 months and therefore there was no departure

DENO S. GREEN, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-394. Opinion filed March 7, 1997. Appeal from the Circuit Court for Orange County, Robert M. Evans, Judge. Counsel: James B. Gibson, Public Defender, and Dee R. Ball, Assistant Public Defender. Daytona Beach. for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner. Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) Deno Green appeals the sentence imposed for one count of attempted voluntary manslaughter with a firearm, a third degree felony.[1] Green scored 93.8 total sentence points on the guidelines scoresheet, which resulted in a recommended state prison term of 65.8 months. He was sentenced to 72 months' incarceration with credit for time served. Green argues that the trial court erred by imposing a sentence in excess of the five year statutory maximum for a third degree felony. See § 775.082(3)(d), Fla. Stat. (1995). He acknowledges that subsection 921.001(5) authorizes a trial court to exceed the maximum sentence otherwise permitted by section 775.092; however, Green contends that where the recommended range encompasses the statutory maximum, the statutory maximum constitutes the maximum allowable sentence.

Section 921.001(5) of the Florida Statutes provides in pertinent part:

> Sentences imposed by trial court judges under the 1994 revised sentencing guidelines on or after January 1, 1994, must be within the 1994 guidelines unless there is a departure sentence with written findings. *If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure.* If a departure, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082. (Emphasis added).

See *also, Gardner v. State*, 661 So. 2d 1274 (Fla. 5th DCA 1995) (rejecting the arguments that section 921.001(5) deprived a defendant of due process by failing to provide adequate notice and violates judicial rule-making authority).

Green's "total sentence points," as defined by Florida Rule of Criminal Procedure 3.702(d)(15), aggregated 93.8 points, which total represents, after deducting 28 points pursuant to Rule 3.702(d)(16), a recommended state prison term of 65.8 months, The sentence imposed on Green of 72 months did not deviate from the recommended sentence of 65.8 months by more than 25% (i.e., 16.45 months); therefore, subsection (d)(18) of the rules did not require the trial court to accompany its sentence with a written statement delineating the reasons for departure. There was no departure.

There is no conflict between the 72-month sentence and the provisions of section 921.001(5), Florida Statutes, quoted above. The trial court *did* impose a "sentence under the guidelines" (see emphasized language of the statute quoted above) when it imposed 72 months. There was no departure sentence in this case, either under the rule or under the statute. A "departure" from a "recommended guidelines sentence" occurs when the sentence imposed varies by more than 25% from a calculated specific number of 12 or above arrived at by subtracting 28 points from the "total sentence points." §§ 921.0014(2), 921.0016(1), Fla. Stat.; Fla. R. Crim. P. 3.702(d)(15) & (16). A sentence which deviates from this specific number by less than 25 % is a permissible "variation," not a "departure." § 921.0016(1)(b), Fla. Stat. The word "departure" in Rule 3.702(18) and the term "departs from" in (18)(a) have the same meaning as the word "departure" has in section 921.0016 and these terms do not encompass those variations from the recommended guidelines sentence which are permitted without stated reasons. See, e.g., *Delancy v. State*, 673 So. 2d 541 (Fla. 3d DCA 1996).

The emphasized line from section 921 .001(5) quoted above should read, for purposes of clarity, as follows: "If *the* recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, a sentence under the guidelines must be imposed. absent a departure." It would appear, from a grammatical standpoint, that the articles in the foregoing sentence are misplaced in the printed statute.

AFFIRMED. (SHARP, W. and GOSHORN, JJ., concur.)

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[1]§§ 782.07, 777.04(4)(d), Fla. Stat. (1995).

* * *

Criminal law-Sentencing-Correction-Doctrine of law of the case bars reconsideration of 3.800(a) motion raising claim that was previously reviewed on the merits and rejected-Defendant estopped to assert the invalidity of original sentence where he accepted benefits of sentence without objection and complained only after violating terms of "illegal" community control

LEONARD STROBLE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-3427. Opinion tiled March 7. 1797. 3.800 Appeal from the Circuit Court for Orange County, Bob Wattles; Judge. Counsel: Leonard Stroble, Mayo, Pro se. No Appearance for Appellee.

ON MOTION FOR REHEARING

(HARRIS, J.) Leonard Stroble has asked for a rehearing on our previous Per Curiam Affirmance. He suggests that we ignored the fact that his original sentence was one not authorized by *Poore* v. *State*, 531 So. 2d 161 (Fla. 1988). We did not ignore this fact; we merely conclude that it makes no difference.

In 1990, Stroble was sentenced as an *habitual offender* but this sentence was suspended provided he successfully serve a term on